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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO. 79-1892

LAREDO COCA-COLA BOTTLING COMPANY,

Respondent-Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Petitioner-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Warren E. Burger, Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States

This is a petition by Laredo Coca-Cola Bottling Company, hereinafter usually referred to as the Company, to review a judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case.

I. OPINIONS BELOW

The Court of Appeals entered its decision enforcing an Order of the National Labor Relations Board (241 NLRB No. 21, March 19, 1979). The decision of the Court of Appeals appears as Appendix A, attached hereto (pp. 1a-8a). The denial of the Petition for Rehearing and for Rehearing En Banc by the Court of Appeals appears as Appendix B, attached hereto.

II. JURISDICTION

The decision of the Court of Appeals was rendered on March 20, 1980. Petitioner's Petition for Rehearing and for Rehearing En Banc was denied on April 17, 1980. The jurisdiction of this Court is invoked under 28 USC §1254.

III. QUESTIONS PRESENTED

Petitioner challenges only that portion of the decision of the Court of Appeals as it relates to the remedy imposed by the National Labor Relations Board in requiring payment by the Company of its discontinued Christmas bonus to its employees. The grounds upon which Petitioner's Writ for Certiorari are based are as follows:

1. The remedy imposed by the Board in requiring payment by Petitioner of its discontinued Christmas bonus is inappropriate under the provisions of Section 10(c) of the National Labor Relations Act, 29 USC Section 160(c); and the decision of the Court of Appeals in this regard is in conflict with applicable decisions of this Court bearing on the appropriateness of remedial orders issued by the Board.

2. The decision of the Court of Appeals is in conflict with the decision of the Court of Appeals for the Ninth Circuit in NLRB v. Pistoresi & Son, 5 F2d 2936 (1974).

3. The decision of the Court of Appeals is in conflict with the rationale

of other of its own decisions bearing on the propriety, vel non, of Board-ordered remedies.

IV. STATUTE INVOLVED

This case involves Section 10(c) of the National Labor Relations Act, as amended, 61 Stat. 146, 73 Stat. 544, 545, 29 USC Section 160(c), which provides in relevant part:

> * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act: * * *
> (Emphasis added)

V. STATEMENT OF THE CASE

In its decision, the Board found that the Company violated Section 8(a)(3) and (5) of the Act by unilaterally discontinuing certain benefits, including a Christmas bonus in 1977, without prior consultation or bargaining with Teamsters Local Union 1110. The Board ordered the Company to make restitution to affected employees by payment of the discontinued 1977 Christmas bonus -- a remedy which is not capable of ascertainment, as evidenced by the facts set forth below.

The record is undisputed that the first time a Christmas bonus was paid was in 1975, when the Company's sales of bottle products increased an unprecedented 33 percent over the previous year's sales; and that the payment of the 1976 Christmas bonus likewise

followed another incremental increase of 33 percent in comparative bottle sales. (The Company stresses bottle sales, since it realizes income both from the production as well as the sale of such products. On the other hand, the Company does not realize any income from the production of canned products, since they must be purchased in finished form from other suppliers.)

The record likewise establishes, without contradiction, that when the bonus was discontinued in 1977, the Company experienced a one percent reduction from the previous year's bottle sales. The only specific evidence bearing on the payment of the

Christmas bonus related to comparative bottle sales. There is thus no basis on the record even to infer that the Christmas bonus was predicated on mere "profitability."

Considering the one percent reduction in bottle sales in 1977, as opposed to the respective 33 percent incremental increases in such sales in 1975 and in 1976, any computation as to the amount of a 1977 Christmas bonus would be based on sheer speculation and conjecture.

In challenging the Board's remedial order, Petitioner argued before the Court of Appeals that even assuming that Petitioner did have an obligation to bargain with the Union over the non-

payment of the Christmas bonus in 1977, no restitution order was warranted in any event, since

(1) such remedy would not effectuate the purposes of the Act,

(2) the remedy was not warranted by the record evidence,

(3) the amount of the discontinued Christmas bonus was not capable of ascertainment, but to the contrary, was based on speculation and conjecture, and

(4) the imposition of such a remedy was inconsistent with the rationale of other court decisions bearing on the appropriateness of Board-ordered relief.

The Court of Appeals rejected the Company's contention that the Board was without statutory authority to issue the restitution order herein. Petitioner's request for rehearing was denied without discussion on April 17, 1980.

VI. REASONS FOR GRANTING THE WRIT

The underlying question presented in this case is of profound significance in national labor law. If permitted to stand, the Board's remedial order would flout legal principles that were first enunciated by this Court more than four decades ago.

As relevant, Section 10(c) "charges the Board with the task of devising remedies to effectuate the policies of the Act." NLRB v. Seven-Up Bottling

Co., 344 U.S. 344 (1953). The Board's power to command affirmative action is remedial, not punitive. Consolidated Edison Company v. National Labor Relations Board, 305 U.S. 197, 235 (1938); Republic Steel Corp. v. National Labor Relations Board, 311 U.S. 7, 10 (1940).

In analogous fact situations involving the unlawful unilateral discontinuance of terms or conditions of employment, the Court of Appeals for the Fifth Circuit has itself refused to adopt or enforce the Board's proposed remedies, on grounds that such remedies would not effectuate the policies of the Act. In NLRB v. American Manufacturing Co., 351 F2d 74 (5th Cir. 1965), the Court of

Appeals characterized the Company's unilateral elimination of its trucking operations as constituting a "classic" refusal-to-bargain. Although the employer's action was motivated in part by anti-union considerations ("one being a purpose to eliminate the Union"), the Court of Appeals refused to enforce the Board's order which would have required the employer to reinstate its trucking operations. In concluding that the Board's remedy would not "effectuate the policies of the Act," Judge Brown reasoned as follows:

> To require bargaining is not to require a bargain. The Employer has, we hold, violated the Act in several particulars. But it is not an outlaw. When it bargains, it must do so in good faith. But on this major issue,

> it may bargain to the bitter end of a real impasse. * * * As with all bargaining -- no bargain, no bonus; no trucks, no truck drivers. See NLRB v. Citizens Hotel Co., 5 Cir., 1964, 326 F2d 501 . . . (Emphasis added).

In NLRB v. Citizens Hotel Co., 326 F2d 501 (5th Cir. 1964), the Board found that following the union's certification, the employer unlawfully discontinued a Christmas bonus which had been disbursed for the previous 14 years. The Court of Appeals upheld the §8(a)(5) refusal-to-bargain allegation, but it denied enforcement with respect to the Board's restitution order requiring payment of the discontinued Christmas bonus. The Court of Appeals disagreed with the Board's finding of anti-union motivation in the elimination of the Christmas bonus -- a factor which arguably had some bearing on the remedial issue in that case.

However, as seen in NLRB v. American Manufacturing Co., supra, the propriety of Board-ordered remedies was examined by the Court of Appeals without regard to the issue of motivation.

Thus, even though the employer's unilateral action was found to have been unlawfully motivated by anti-union considerations, the Court of Appeals viewed the proposed remedy independently from the §8(a)(5) violation, and recognized that the Board's remedial orders nevertheless "must find adequate support in the record." NLRB v. American Manufacturing Co., supra. As expressed by Judge Brown:

> In exacting that here, we do not hold that the Board could not properly impose such a remedy. We hold merely that it lacks necessary support in this record. * * *

In the case at bar, the Board has attempted to fashion a remedy which is not capable of ascertainment. Under analogous circumstances, the Court of Appeals has been consistent in denying enforcement of Board remedial orders which were imporperly predicated on speculation or assumption. As it observed in NLRB v. W. R. Grace & Co., 571 F2d 279 (5th Cir. 1978):

> The Board cannot "fashion remedies on the basis of an assumption as to what the parties would have agreed to absent an employer's failure to bargain in good faith."

In the case sub judice, the Board has obviously made such an assumption with regard to the order requiring payment of the 1977 Christmas bonus. Petitioner may not legitimately be compelled to reimburse its employees for the nonpayment of the 1977 bonus. In the first place, there was no perceptible objective formula in the Company's determination of the total amount of the bonus to be distributed to employees. In the second place, the bonuses in 1975 and in 1976 were based upon comparative increases in bottle sales of more than 33 percent, respectively, over corresponding sales for each of the previous years; on the other hand, the Company experienced

a one percent decrease in 1977 comparative bottle sales.

An analogous fact situation compelled the Court of Appeals for the Ninth Circuit to deny enforcement of a Board decision and order involving a similar unilateral discontinuance of a Christmas bonus, NLRB v. Pistoresi & Son, 5 F2d 2936 (9th Cir. 1974). As observed by the dissenting Board member in that case, whose dissenting opinion was subsequently adopted by the Ninth Circuit:

> It escapes me how the compliance officer in the Regional Office can be expected to compute the amounts that would have been paid and the identity of recipients. Any such determination must be based on sheer speculation. (Emphasis added).

Thus, we are faced here not only with a conflict with the decision of the Court of Appeals for the Ninth Circuit in NLRB v. Pistoresi & Son, supra, but with irreconcilable conflicts with this Court's long-established principles bearing on the construction of Section 10(c) of the Act, and with prior analogous decisions of the Court of Appeals for the Fifth Circuit, as well.

VII. CONCLUSION

In the absence of objective considerations on the record which would permit some legitimate ascertainment as to the amount of the discontinued Christmas bonus, the Board's proposed remedy

may not stand, since the Board may not "fashion remedies on the basis of an assumption as to what the parties would have agreed to absent an employer's failure to bargain in good faith." NLRB v. W. R. Grace & Co., supra. The remedy imposed by the Board and the Court of Appeals with regard to the discontinued Christmas bonus would not effectuate the policies of the Act. The proper interpretation and application of Section 10(c) of the Act precludes the Board from fashioning a remedy which is based on mere conjecture or speculation.

WHEREFORE, Petitioner prays that a Writ of Certiorari issued to review the judgment of the United States Court of

Appeals for the Fifth Circuit in the above entitled case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the Supreme Court, certifies that true and correct copies of the foregoing petition have been forwarded by Certified Mail this 29th day of May, 1980, to Elliott Moore, Deputy Associate General Counsel, National Labor Relations Board, 1717 Pennsylvania Avenue, N.W., Washington, D. C. 20570; and to the Solicitor General, Department of Justice, Room 5614, Washington, D. C. 20530.

Frank S. Manitzas

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

LAREDO COCA COLA BOTTLING COMPANY, Respondent.

No. 79-2697
Summary Calendar.*

United States Court of Appeals, Fifth Circuit.

March 20, 1980.

On application for enforcement of an order of the National Labor Relations Board, the Court of Appeals, Vance, Circuit Judge, held that: (1) substantial evidence on the record as a whole supported NLRB's finding that company violated the National Labor Relations Act by coercively interrogating its employees and by making threats and other coercive statements to its employees; (2) substantial evidence also supported NLRB's findings that in December and January, following union's certification and the start of negotiations, company committed unfair labor practices by discontinuing four employee benefits without consulting with the union and in retaliation for the employees' choice of union representation; and (3) where union requested that company provide it with a list of employees' terms and conditions of employment including benefits received, but where the company's list failed to include four employee benefits that it had unilaterally discontinued, the company thereby committed an unfair labor practice by refusing to bargain.

Enforced.

1. Labor Relations ⇐383

In assessing the activity of an employer, who is barred by the National Labor Relations Act from restraining or coercing employees in the exercise of their organizational rights, the relevant inquiry is not limited to examining the ostensible meaning or likely impact on employees of the employer's statements; the scope of inquiry must encompass the entire pattern of employer conduct. National Labor Relations Act, § 8(a)(1) as amended 29 U.S.C.A. § 158(a)(1).

2. Labor Relations ⇐680

If there is substantial evidence on the record taken as a whole for the NLRB's finding of a violation of the National Labor Relations Act, reviewing court will not disturb the finding.

3. Labor Relations ⇐557, 570

Substantial evidence on the record as a whole supported NLRB's finding that company violated the National Labor Relations Act by coercively interrogating its employees and by making threats and other coercive statements to its employees. National Labor Relations Act, § 8(a)(1) as amended 29 U.S.C.A. § 158(a)(1).

4. Labor Relations ⇐367

National Labor Relations Act is violated by employer threats of reprisals for supporting a union, or by remarks concerning the futility of electing a union. National Labor Relations Act, § 8(a)(1) as amended 29 U.S.C.A. § 158(a)(1).

5. Labor Relations ⇐379

Because strikers were unfair labor practice strikers with an unconditional

* Fed.R.App. 34(a); 5th Cir. R. 18.

right of reinstatement, company's remarks that employees hired to replace the strikers were permanent and that it planned to replace all strikers constituted threats not to reinstate the striking employees and were violative of the National Labor Relations Act. National Labor Relations Act, § 8(a)(1) as amended 29 U.S.C.A. § 158(a)(1).

6. Labor Relations ⇐557

NLRB's findings that verbal threats and remarks about the futility of unionization had been made were not inherently unreasonable or self-contradictory. National Labor Relations Act, § 8(a)(1) as amended 29 U.S.C.A. § 158(a)(1).

7. Labor Relations ⇐538

Because the only contrary evidence offered by company was minimal and uncertain, it was appropriate to infer, in unfair labor practice proceeding brought against the company, that the testimony of company's president, who was not produced as a witness, would have been adverse to the company's position.

8. Labor Relations ⇐382.1

Although interrogation into union activities is not per se illegal, any interrogation presents an ever present danger of coercing employees in violation of their protected rights. National Labor Relations Act, § 8(a)(1) as amended 29 U.S.C.A. § 158(a)(1).

9. Labor Relations ⇐382.1

Whether a particular instance of interrogation reasonably tended to coerce employees is determined in light of the totality of the circumstances in which the interrogation occurred. National Labor Relations Act, § 8(a)(1) as amended 29 U.S.C.A. § 158(a)(1).

10. Labor Relations ⇐561

Substantial evidence on the record as a whole supported NLRB's findings that in December and January, following union's certification and the start of negotiations, company committed unfair labor practices by discontinuing four employee benefits without consulting with the union and in retaliation for the employees' choice of union representation. National Labor Relations Act, § 8(a)(5), (d) as amended 29 U.S.C.A. § 158(a)(5), (d).

11. Labor Relations ⇐393

Employer breaches its responsibilities under the National Labor Relations Act when, without bargaining, it institutes a change in existing job terms in retaliation for the employees' union activity. National Labor Relations Act, § 8(a)(5) as amended 29 U.S.C.A. § 158(a)(5).

12. Labor Relations ⇐179

National Labor Relations Act confers on the employer, as part of his duty to bargain, an obligation to provide relevant information needed by the union for the proper performance of its duties. National Labor Relations Act, § 8(a)(1, 5) as amended 29 U.S.C.A. § 158(a)(1, 5).

13. Labor Relations ⇐389

Where union requested that company provide it with a list of employees' terms and conditions of employment, including benefits received, but where the company's list failed to include four employee benefits that it had unilaterally discontinued, the company thereby committed an unfair labor practice by refusing to bargain. National Labor Relations Act, § 8(a)(1, 5) as amended 29 U.S.C.A. § 158(a)(1, 5).

14. Labor Relations ⇐379

A strike instituted to protest an employer's violations of the National Labor Relations Act is an unfair labor practice strike and, under the Act, the striking employees do not lose their status and are entitled to reinstatement even if replacements for them have been made; this result is unchanged even if the alleged unfair labor practice is only one of many causes of the strike. National Labor Relations Act, § 8(a)(3) as amended 29 U.S.C.A. § 158(a)(3).

Application for Enforcement of an Order of the National Labor Relations Board.

Before CHARLES CLARK, VANCE and SAM D. JOHNSON, Circuit Judges.

VANCE, Circuit Judge:

The National Labor Relations Board (the board) petitions this court to enforce its March 19, 1979, order finding the Laredo Coca Cola Bottling Company (the company) guilty of various unfair labor practices, and granting relief.[1] We conclude that the board's order should be enforced.

The company, which employs approximately 65 people, manufactures, sells and distributes Coca Cola and allied products. On June 30, 1977, the union[2] petitioned the board for an election. It sought to represent a unit consisting of the company's truckdrivers, driver helpers, loaders, warehousemen, production employees, auto and cooler mechanics, painters, pre-mix employees and warehouse janitors.

Shortly after the union filed its petition, a company supervisor, Molina, told Urbano, an employee, that the employees would lose their bonuses, Christmas savings, regular savings, vacations and all benefits, including pay raises, because of union activities.[3] Molina added that the Christmas bonus money would be used to pay attorneys fees and that Lamar Gill, the company president, said that he would never sign a contract with the union. A week before the election, another supervisor, Guerrero, told employee Lopez that Gill had said that he would not sign a contract with the union and would "prefer to sell the company before signing any contract."

On three occasions prior to the representation election company management held meetings to dissuade employees from voting for the union and to encourage them to vote against it. These meetings were held on company time, at the company's premises. General manager Payne conducted the first two "captive audience" meetings; Gill conducted the third on August 17, two days before the election. At the meeting conducted by Gill he asked Urbano if he had written an anonymous letter criticizing Payne and the supervisors. Gill told the employees that he did not want a union, that the plant would never have a union, and that he would never sign a contract

1. 241 N.L.R.B. No. 21 (March 19, 1979).

2. Local 110, Brewery, Soft Drink, Grain, Flour, Candy, Industrial and Allied Workers, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

3. Urbano was again approached by Davila about the upcoming elections three or four days before the election.

with a union.[4] Gill also stated that there would be no Christmas bonus that year and that the funds that would otherwise be used to pay Christmas bonuses would be used to pay his attorney's expenses in opposing the union. He further indicated that other benefits were to be terminated.

On August 19 a majority voted in favor of union representation. On August 29 the board regional director certified the union as the collective bargaining representative of the unit employees. The company and union commenced negotiations on October 1. The union rejected the company's "last offer" on November 18.[5] The company thereafter eliminated several established employee benefits. It discontinued two employee savings funds and its Christmas bonus in December, and eliminated the truckdrivers' first quarter wage increment in January 1978. Following additional bargaining meetings and the union's filing of unfair labor practice charges, the employees went out on strike on March 14.

The Company's Coercive Statements

[1–3] Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), bars employers from acting in a manner that reasonably tends to interfere with, restrain or coerce employees in the exercise of their organizational rights. *See generally NLRB v. Varo, Inc.*, 425 F.2d 293, 299–301 (5th Cir. 1970). In assessing an employer's activity, the relevant inquiry is not limited to examining the ostensible meaning or the likely impact on employees of the employer's statements: "'[t]he scope of inquiry must encompass the entire pattern of employer conduct. Remarks that may not appear coercive when considered in isolation may take on a different meaning when evaluated with respect to the totality of the circumstances.'" *NLRB v. Kaiser Agricultural Chemicals*, 473 F.2d 374, 381 (5th Cir. 1973). *Accord, NLRB v. Harbison-Fischer Manufacturing Co.*, 304 F.2d 738, 739 (5th Cir. 1962). The responsibility for conducting this inquiry resides primarily with the board. If there is substantial evidence on the record taken as a whole for the board's finding of a violation of the Act, the reviewing court will not disturb the board's findings. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951). The requisite evidence exists in this case to support the board's findings that the company violated section 8(a)(1) of the Act by coercively interrogating its employees and by making threats and other coercive statements to its employees.

[4, 5] Section 8(a)(1) is violated by threats of reprisal for supporting a union, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618–20, 89 S.Ct. 1918, 1942–43, 23 L.Ed.2d 547 (1969); *J. P. Stevens & Co. v. NLRB*, 441 F.2d 514, 518 (5th Cir.), *cert. denied*, 404 U.S. 830, 92 S.Ct. 69, 30 L.Ed.2d 59 (1971), or by remarks concerning the futility of electing a union, *NLRB v. Varo, Inc.*, 425 F.2d at 299; *see NLRB v. Henriksen, Inc.*, 481 F.2d 1156, 1162 (5th Cir. 1973). As indicated earlier, such threats and remarks were made by Molina,[6] Guerrero and Gill. In

4. Gill indicated that not even President Carter could make him sign a contract.

5. The unresolved issues included wages, management rights and union dues deduction.

6. Molina made these comments in early July, more than six months before the charge was filed in this case. Under section 10(b) of the Act, 29 U.S.C. § 160(b), these comments cannot be found to be an unfair labor practice.

addition, after the employees went on strike, the company was accurately quoted in the *Laredo Times* as having said that employees hired to replace the strikers were permanent and that the company planned to replace all strikers. Because the strikers were unfair labor practice strikers with an unconditional right of reinstatement, *Mastro Plastics Corp. v. NLRB,* 350 U.S. 270, 278, 76 S.Ct. 349, 355, 100 L.Ed. 309 (1956), these comments constituted threats not to reinstate the striking employees.

[6, 7] The board found that verbal threats and remarks about the futility of unionization had been made on the basis of the credited testimony of several general counsel witnesses. We cannot say that these findings are "inherently unreasonable or self-contradictory." *NLRB v. Standard Forge & Axle Co.,* 420 F.2d 508, 510 (5th Cir. 1969), *cert. denied,* 400 U.S. 903, 91 S.Ct. 140, 27 L.Ed.2d 140 (1970). We also find no fault with the board's credibility resolutions. *See NLRB v. Soft Water Laundry, Inc.,* 346 F.2d 930, 934 (5th Cir. 1965). The company did not, for example, produce Gill as a witness; rather it relied on the testimony of office manager Villarreal, who stated that he did not recall "many specifics" of what Gill said. Because the only contrary evidence offered by the company was minimal and uncertain, it was appropriate to infer that the testimony of Gill would have been adverse to the company's position. *Compare Interstate Circuit, Inc. v. United States,* 306 U.S. 208, 225–26, 59 S.Ct. 467, 473–74, 83 L.Ed. 610 (1939) *with Golden State Bottling Co. v. NLRB,* 414 U.S. 168, 174 & n.3, 94 S.Ct. 414, 420 & n.3, 38 L.Ed.2d 388 (1973). We have carefully scrutinized the company's arguments concerning the credibility of the general counsel's witnesses, especially Urbano. These arguments, however, are unpersuasive. The administrative law judge properly found that the company's statements were coercive in view of the context in which they were made. *NLRB v. Virginia Electric & Power Co.,* 314 U.S. 469, 478, 62 S.Ct. 344, 348, 86 L.Ed. 348 (1941).

[8, 9] Coercive employer interrogation of employees is also prohibited under section 8(a)(1). Although interrogation into union activities is not per se illegal, *Ridgewood Management Co. v. NLRB,* 410 F.2d 738, 740 (5th Cir.), *cert. denied,* 396 U.S. 832, 90 S.Ct. 87, 24 L.Ed.2d 83 (1969), "[a]ny interrogation . . . presents an ever present danger of coercing employees in violation of their § 7 rights." *Texas Industries, Inc. v. NLRB,* 336 F.2d 128, 133 (5th Cir. 1964).[7] *Accord, NLRB v. Varo, Inc.,* 425 F.2d at 298. Whether a particular instance of interrogation reasonably tended to coerce employees is determined in light

They are, however, properly "utilized to shed light on the true character of matters occurring within the limitations period . . ." that themselves constitute unfair labor practices. *Local Lodge No. 1424 v. NLRB,* 362 U.S. 411, 416, 80 S.Ct. 822, 826, 4 L.Ed.2d 832 (1960). The administrative law judge properly considered this as background evidence for "adducing [the company's] motivation for its acts within the 10(b) period."

7. As the board stated,

> [A]n employee is entitled to keep from his employer his views so that the employee may exercise a full and free choice on whether to select the Union or not, uninfluenced by the employer's knowledge or suspicion about those views and the possible reaction toward the employee that his views may stimulate in the employer. That the interrogation might be courteous and low keyed instead of boisterous, rude and profane does not alter the case.

of the totality of the circumstances in which the interrogation occurred. *NLRB v. Kaiser Agricultural Chemicals*, 473 F.2d at 381. The company clearly manifested its hostility toward the union to its employees. In this environment, shortly before the election, supervisor, Davila asked Urbano about the union's prospects and "who do [you] think will win" the election? After announcing to the third captive audience meeting that he did not want to talk with the truckdrivers because they were all against him, Gill asked truckdriver Urbano if he had written a letter critical of company officials. The board found that Davila's questions "were invitations to Urbano to disclose his union activities, sympathies and the current status of union strength among employees," and that Gill's question "was a necessary and implicit invitation to disclose anti[company] feelings and . . . union sympathies . . ." Applying *Paceco v. NLRB*, 601 F.2d 180, 183 (5th Cir. 1979), to evaluate the coercive nature of the interrogations that occurred in this case, we conclude that the board was warranted in finding that the interrogations in question violated section 8(a)(1) of the Act.[8] *See Universal Camera Corp. v. NLRB*, 340 U.S. at 488, 71 S.Ct. at 464.

The Company's Unilateral Alteration of Existing Job Terms

[10, 11] Substantial evidence on the record as a whole supports the board's findings that in December and January, following the union's certification and the start of negotiations, the company discontinued four employee benefits without consulting with the union and in retaliation for the employees' choice of union representation. The employer breaches its duty under sections 8(a)(5) and 8(d) of the Act, 29 U.S.C. §§ 158(a)(5) & 158(d), when it alters existing "wages, hours, and other terms and conditions of employment," *id.* § 158(d), including employee benefits, without notifying and bargaining with the union concerning the alteration. *NLRB v. Katz*, 369 U.S. 736, 742–43, 747–48, 82 S.Ct. 1107, 1111, 1113–14, 8 L.Ed.2d 230 (1962); *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 97–99 (5th Cir. 1970). The employer breaches its responsibilities under section 8(a)(5) of the Act when, without bargaining, it institutes a change in existing job terms in retaliation for employees' union activity. *NLRB v. W. R. Grace & Co.*, 571 F.2d 279, 282–83 (5th Cir. 1978).

The four employee benefits in issue here are the first quarter wage supplement, two savings funds and the Christmas bonus. These benefits are "terms and conditions of employment," which the employer may not unilaterally change, if "the employer by promises or by a course of conduct has made [the] benefit part of the established wage or compensation system." *NLRB v. Dothan Eagle, Inc.*, 434 F.2d at 98.

Section 8(a)(5) applies to the Christmas bonus because of the company's promises and prior conduct. Such bonuses were given at least since 1975 and, when distributed in that year and 1976, were accompanied by promises that they would continue to be given. The company asserts, however, that the bonus was discretionary and that its decision to discon-

8. The *Paceco* test is not definitive and "intimidation may occur even if all of [the *Paceco*] factors cut in favor of the employer." *NLRB v. Camco, Inc.*, 340 F.2d 803, 804 (5th Cir.), *cert. denied*, 382 U.S. 926, 86 S.Ct. 313, 15 L.Ed.2d 339 (1965). Yet *Paceco* clearly governs this case.

tinue the bonus was made on economic grounds. The board described this assertion of economic grounds as "a mere *post hoc* pretextual contrivance to explain its failure to pay a bonus of any sort."[9] Because the board was warranted in finding that the bonus was not discretionary, the company's assertion regarding its motives is beside the point: "It is irrelevant that the company's action was based on compelling economic considerations. An employer is not required to forego needed changes, but he must first notify the union in order that the voices of those affected by the changes are heard." *NLRB v. W. R. Grace & Co.*, 571 F.2d at 283. *Accord, Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 213–14, 85 S.Ct. 398, 404–05, 13 L.Ed.2d 233 (1964); *NLRB v. American Manufacturing Co.*, 351 F.2d 74, 79 (5th Cir. 1965).[10]

The company contends that the other three changes in employee benefits were made before the onset of the collective bargaining process. It claims that a $5.00 weekly raise in base pay given to its driver-salesmen in May 1977 was a substitute for, and an improvement upon, the traditional first quarter wage supplement. The board found to the contrary because the company never told drivers that the raise was a substitute for the wage supplement and because the company was unable to provide a reason for this wage structure change. The company claims that its decision to eliminate the two savings, but not interest drawing, programs was made in January 1977. Deductions for these programs for at least some employees continued to be made until December 1977. The board disbelieved the company's explanation that both savings funds were discontinued because of computerization and that the Christmas fund was discontinued because its underlying purpose had been defeated. The credited evidence concerning the termination of these three employee benefits amply supports the board's findings. *See Universal Camera Corp. v. NLRB*, 340 U.S. at 488, 71 S.Ct. at 464.

The Company's Refusal To Bargain

[12, 13] Sections 8(a)(1) and 8(a)(5) of the Act confer on the employer, as a part of his duty to bargain, an obligation to provide relevant information needed by a union for the proper performance of its duties. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–36, 87 S.Ct. 565, 567–68, 17 L.Ed.2d 495 (1967); *Waycross Sportswear, Inc. v. NLRB*, 403 F.2d 832, 836 (5th Cir. 1968). The union requested that the company provide it with a list of the employees' terms and conditions of employment, including the benefits received. The company's list failed to include the four employee benefits that it had unilaterally discontinued. Because such information concerning job terms is relevant and useful to the union in executing its statutory duties, the company's refusal to provide even part of that information constitutes a refusal to bargain. *See Prudential Insurance Co. v. NLRB*, 412 F.2d 77, 83–84 (2d Cir.), *cert. denied*, 396 U.S. 928, 90 S.Ct. 263, 24 L.Ed.2d 226 (1969).

9. The company implies, but does not argue, that this statement reveals the bias of the administrative law judge. The record does not support this innuendo.

10. Similarly, the employer's offer to discuss the possibility of returning to prior job terms previously altered, unilaterally, does not mitigate the statutory violation created by that previous unilateral change. *NLRB v. J. P. Stevens & Co.*, 538 F.2d 1152, 1163 (5th Cir. 1976).

The Unfair Labor Practice Strike

[14] A strike instituted to protest an employer's violations of the Act is an unfair labor practice strike and, under section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3), the "striking employees do not lose their status and are entitled to reinstatement . . . even if replacements for them have been made." *Mastro Plastics Corp. v. NLRB*, 350 U.S. at 278, 76 S.Ct. at 355. *Accord, NLRB v. Safway Steel Scaffolds Co.*, 383 F.2d 273, 280–81 (5th Cir. 1967), *cert. denied*, 390 U.S. 955, 88 S.Ct. 1052, 19 L.Ed.2d 1150 (1968). This result is unchanged, even if the alleged unfair labor practice was only one of many causes of the strike. *NLRB v. Pope Maintenance Corp.*, 573 F.2d 898, 905–06 (5th Cir. 1978); *see NLRB v. Gulf-Wandes Corp.*, 595 F.2d 1074, 1079 (5th Cir. 1979). There is sufficient evidence to support the board's finding that "the Union struck principally over the unlawful unilateral and discriminatory changes."

ENFORCED.

United States Court of Appeals

FIFTH CIRCUIT

Gilbert F. Ganucheau
Clerk

OFFICE OF THE CLERK

TEL 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

April 17, 1980

TO ALL PARTIES LISTED BELOW:

NO. 79-2697 - N.L.R.B. v. LAREDO COCA COLA BOTTLING CO.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 10) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By Sally Hayward
Deputy Clerk

cc: Mr. Elliott Moore
Mr. Frank S. Manitzas

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 19

No. 79-2697
Summary Calendar

N.L.R.B. NO. 23-CA-6870

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

versus

LAREDO COCA COLA BOTTLING COMPANY,

Respondent.

Application for Enforcement of an Order of the National Labor Relations Board

Before CHARLES CLARK, VANCE and SAM D. JOHNSON, Circuit Judges.

J U D G M E N T

On March 20, 1980, being fully advised in the premises, the Court handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF it is hereby ordered and adjudged that the said order of the National Labor Relations Board be enforced and that Laredo Coca Cola Bottling Company, its officers, agents, successors, and assigns, abide by and perform the directions in said order contained.

Costs are taxed against the respondent.

FILED: March 20, 1980

ISSUED AS MANDATE:

No. 79-1892

Supreme Court, U. S.
FILED
JUL 18 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

LAREDO COCA-COLA BOTTLING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board reasonably exercised its remedial authority by requiring the employer to reimburse the employees for an unlawfully withheld Christmas bonus.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 613 F. 2d 1338. The decision and order of the National Labor Relations Board are reported at 241 N.L.R.B. No. 21.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1980 (Pet. App. 10a). A petition for rehearing was denied on April 17, 1980 (Pet. App. 9a). The petition for a writ of certiorari was filed on May 30, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provision of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, is set forth at page 5 of the petition.

STATEMENT

In August 1977, Local 1110, Brewery, Soft Drink, Grain, Flour, Candy, Industrial and Allied Workers, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("the Union"), was certified as the bargaining agent of a unit of petitioner's ("the Company's") employees (R. 574).[1] Thereafter, the Company and the Union began a series of collective bargaining meetings, but no agreement was reached; on November 18, the

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[1]The Company manufactures, sells, and distributes soft drinks (R. 572). "R." refers to the paginated volume of pleadings filed in the court of appeals. "Tr." refers to the transcript of testimony in the Board proceeding. Petitioner failed to reproduce the Board's decision and order in the appendix to its petition. We are lodging with the Clerk of the Court a copy of the paginated volume of pleadings, which contains that decision and order.

Union rejected the Company's "last offer" (*ibid.*). In December, the Company discontinued two employee savings funds and also its Christmas bonus; and, in January 1978, it eliminated the truck drivers' first quarter wage increment (R. 576-578, 580). In March, following additional collective bargaining meetings and the Union's filing of unfair labor practice charges, the unit employees went out on strike (R. 574).

The Board found that the Company violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by coercively interrogating and threatening its employees during the Union's organizing campaign (R. 597-598).[2] The Board also found that the Company violated Sections 8(a)(5), (3) and (1) of the Act by making a change in the wage structure of its driver-salesmen, and by discontinuing its accounts receivable and Christmas savings funds and its Christmas bonus[3] without bargaining with the Union and

---

[2]The Board found, *inter alia*, that the Company's president told the employees that there would be no Christmas bonus that year and that the funds that would otherwise be used to pay Christmas bonuses would be used to pay his attorney's expenses in opposing the Union (R. 585; Tr. 135, 190, 485, 533).

[3]In December 1974, all employees received a Christmas bonus of a case of Coca-Cola, a case of Budweiser beer, a canned ham, a fruitcake and a calendar (R. 578; Tr. 141). In December 1975, the employees again received this bonus. In addition, along with their regular paychecks, they were given bonus checks (R. 578; Tr. 142-143). Company President Gill told the employees that he was happy with them, that sales were high, and that they therefore were being paid a Christmas bonus (R. 578; Tr. 142). He also told them they could expect a Christmas bonus from then on (R. 578; Tr. 142, 490, 530). In December 1976, the employees were given a case of Coca-Cola and bonus checks. Gill again said that he was happy with the employees, that "sales were up again," and that they therefore were being paid a bonus (R. 578; Tr. 144). Although 1977 was a profitable year, the employees did not receive any bonus in December 1977. They were given no explanation for the Company's failure to give them a bonus (R. 579; Tr. 145-146).

in retaliation for the employees' union activities (R. 598). The Board further found that the Company violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with information concerning four benefit programs (R. 598). Finally, the Board found that the strike, which began on March 14, 1978, was an unfair labor practice strike from its inception (R. 599).

The Board ordered the Company, *inter alia*, to reinstate the discontinued benefits and make the employees whole for the loss of such benefits (R. 602). In ordering reinstatement of the Christmas bonus, the Board, adopting the decision of the Administrative Law Judge, rejected the Company's assertion that the bonus was "paid merely out of a fund derived from a 'dramatic increase' in *bottle sales*; * * * [rather than] on the basis of increased sales and [the Company's] ability to pay" (R. 600; emphasis in original). The Board also rejected the contention that the make-whole remedy was inappropriate because the exact amount of the bonus to be paid each employee was not known. It noted that "this case does not involve a speculation as to which unit employees would have received the Christmas bonus for the evidence of record demonstrates that *all* employees, unit employees and others, received the Christmas bonus" (*ibid.*; emphasis in original). The Board further noted that the exact amount due each employee could be determined in a back pay proceeding, if necessary (*ibid.*).

The court of appeals upheld the Board's decision and enforced its order. Concerning the Christmas bonus, the court agreed with the Board that the "company's promises and prior conduct" made the bonus a condition of employment that could not be discontinued without bargaining with the Union (Pet. App. 6a-7a).

ARGUMENT

1. Petitioner does not contest the Board's findings, sustained by the court of appeals, that it withheld the employees' 1977 Christmas bonus without first bargaining with the Union and in retaliation for the employees' selection of the Union as their representative. It contends, however, that the requirement of the Board's order that the employees be reimbursed for the wrongfully withheld bonus is an abuse of the Board's remedial authority under Section 10(c) of the Act, 29 U.S.C. 160(c),[4] because the amount of the bonus is "not capable of ascertainment" but is based on "speculation and conjecture" (Pet. 9). There is no merit to this contention, which depends in part on petitioner's attack on factual findings and a determination of witness credibility made by the Board.

Petitioner contends that the 1975 and 1976 bonuses were "based upon comparative increases in bottle sales of more than 33 percent, respectively, over corresponding sales for each of the previous years; on the other hand, the Company experienced a one percent *decrease* in 1977 comparative bottle sales" (Pet. 16-17). The Board found, however, that the Company based its bonuses, not on bottle sales alone, but on total profitability, discrediting the witness who testified that they were based on bottle sales only (R. 586-587). Nor does the fact that "there was no perceptible objective formula" by which to determine the amount of the bonuses (Pet. 16) negate the propriety of a make-whole remedy. *NLRB* v. *Hudson Transit Lines*,

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[4]Section 10(c) empowers the Board, upon finding that an unfair labor practice has been committed, to order the perpetrator "to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the] Act * * *." A Board order that serves to restore the *status quo ante* is an appropriate remedial measure. See *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 539-541 (1943).

Inc., 429 F. 2d 1223, 1232 (3d Cir. 1970), cert. denied, 401 U.S. 911 (1971); *NLRB* v. *Darling & Co.*, 420 F. 2d 63, 66 (7th Cir. 1970). If the Board and the Company are unable to agree on the amount of the bonus, that question may be resolved in a supplemental compliance proceeding. Such a proceeding and its results would be subject to further review by the court of appeals should that prove necessary. See *NLRB* v. *Ellis and Watts Products, Inc.*, 344 F. 2d 67 (6th Cir. 1965); *NLRB* v. *C.C.C. Associates, Inc.*, 306 F. 2d 534, 539-540 (2d Cir. 1962).

2. The cases relied on by petitioner (Pet. 11-18) are factually distinguishable and as to all but one of them, any inconsistency with the court of appeals' decision here would represent only an intra-circuit conflict inappropriate for review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

While in *NLRB* v. *American Manufacturing Company of Texas*, 351 F. 2d 74 (5th Cir. 1965), the court declined to enforce the portion of the Board's order requiring the employer to resume trucking operations that had been unlawfully discontinued, it did so because this would have involved a substantial capital outlay of $150,000 to purchase a fleet of trucks that would be useless if, after good faith bargaining, the employer adhered to its original decision to use public carriers. Moreover, in the court's view, it was not necessary to afford the union "the economic pressure of this tentative, perhaps momentary, but nonetheless mandatory investment as an aid to the bargaining," since the court had ordered "back pay and reinstatement of the employees" who had been terminated as a consequence of the discontinuation of operations (351 F. 2d at 80-81). Here, on the other hand, the make-whole remedy does not involve such an extraordinary investment, and, because the bonus was a yearly event

that came due and payable in December, there is no possibility that the employer would be required to make an expenditure which could be rendered nugatory by good faith bargaining.[5]

In *NLRB* v. *Nello Pistoresi & Son*, 500 F. 2d 399 (9th Cir. 1974), the court refused to enforce a Board order requiring payment of a Christmas bonus because it found that the employees had no reasonable expectation of such a bonus in view of "the short [two-year] history and indefinite nature of the bonuses" (*id.* at 401). Here, by contrast, the court sustained the Board's findings that the Company had an established practice of giving Christmas bonuses going back at least three years, and that the Company had promised that the bonuses would continue (pages 2-3, *supra*).

Finally, in *NLRB* v. *W.R. Grace & Co.*, 571 F. 2d 279 (5th Cir. 1978), the employer, without bargaining with the union, discontinued production of a product called Monokote and permanently laid off four employees involved in producing the product. The Board ordered the employer to bargain with the union about the effects of eliminating the production of Monokote, to pay the four

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[5]In *NLRB* v. *Citizens Hotel Co.*, 326 F. 2d 501 (5th Cir. 1964), the court, although recognizing that "there are circumstances in which, to effectuate the dominant policy of collective bargaining in good faith, a restitution order is permissible or required," found that the circumstances there did not warrant the Board's order requiring payment of a Christmas bonus that had been unilaterally withheld (*id.* at 508). The court noted the employer's "history of continuous unprofitable operations, the necessity for invading capital or borrowing money by which to pay the Christmas bonus," and the fact that, apart from the single impermissible unilateral change, the "record shows no further or other obstruction, technical or otherwise, to bargaining" (*ibid.*). There is no history of unprofitable operations here, and, as shown (pages 2-3, *supra*), the Company not only withheld the bonus for an unlawful purpose, but engaged in other unfair labor practices.

employees their normal wages during the bargaining, and to establish a preferential hiring list containing the names of the four employees and offer them reinstatement should it resume production of Monokote. The court declined to enforce the preferential hiring requirement and the order to offer reemployment on the ground that they amounted to "the Board's compelling agreement by the company to a substantive contractual provision" (571 F. 2d at 283). The Board cannot "fashion remedies on the basis of an assumption as to what the parties would have agreed to absent an employer's failure to bargain in good faith" (*ibid.*). As shown above, the Christmas bonus here was an established feature of the employees' terms and conditions of employment, so the Board was not required to make any such assumption in the present case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1980